

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF)
)
W. B.)
)
PETITIONER,)
)
vs.)
)
METRO NASHVILLE)
PUBLIC SCHOOLS.)
)
RESPONDENT.)

No. 06-39

OPINION

This matter was heard on the December 7, 8, and 15, 2006 before the Honorable Richard Walker, Administrative Law Judge for the Department of Education, State of Tennessee, Special Education Division. The parties submitted post trial briefs on January 29, 2007. It is undisputed that the child, W. B., is three years of age and attends Metro Nashville School System in Nashville, Tennessee. The child is currently placed in the regular preschool classroom. W. B. is intellectually gifted under Tennessee law since he has an IQ of 130. Intellectually gifted by definition refers to having intellectual abilities and potential for achievement so outstanding that special provisions are required to meet the students educational needs to insure a free appropriate public education.

The child in this case has been placed in a classroom which the school system refers to as Encore. All students in this class are intellectually gifted but none receive special education services. Approximately three years ago the program contained more than 115 students. At

that time all of the students received a little more than 3.25 hours per week of special education services and all had individualized educational programs.

Subsequently, one year later the school system determined that all of the children in this group would be in the regular classroom (Encore). Therefore, all of the children who had once had individualized educational programs were not considered special education students nor did they receive special education services. As of the time of this hearing the status has not changed. This class has reduced in size to approximately 81 students and W. B is one of the students.

The child through his mother brought this due process case alleging numerous procedural and substantive law violations contending that the child has been denied a free appropriate public education. The school system does not dispute that the child is intellectually gifted but only asserts that any procedural violations were, if any, harmless and that the child is not in need of special education services in order to receive a free appropriate public education.

ISSUES

1. The main issue in this case is whether or not the child is in need of special education services in order to receive a free appropriate public education.
2. The second issue is whether the school system violated any procedural rights of the child under state or federal law.

FINDING OF FACTS AND CONCLUSION OF LAW

The Court has reviewed the extensive transcript and exhibits submitted by both parties in this case and after consideration of the same made the following determination: Tennessee has expanded the term handicapped children under 20 U.S.C. §1401 (1) to include intellectually gifted and any other child whose needs and abilities cannot be served in the regular classroom setting T.C.A. §49-10-102(1)(B). Therefore, intellectually gifted children in Tennessee are entitled to substantially the same rights as other disabled children. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 203 (1982) held that a school district must provide a free appropriate public education with “personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.”

The Plaintiff in any due process case brought has the burden of proving by the preponderance of evidence that special education and related services are needed or required to receive a free appropriate public education. In Deal v. Hamilton County Board of Education, 42 IDELR 109 (6th Circuit 2004), the Court in discussion of a substantive law question as to whether or not a child’s potential should be maximized stated, “we agree that IDEA requires an individualized educational program to confer a meaningful educational benefit in relation to the potential of the child at issue.”

In Benjamin R., 508 IDELR 183 (Mass. State Agency), an intellectually gifted child was held to need special education services through an individualized educational program. The Court determined in that case that the cause of concern was not the child’s superior test scores but rather whether they reflect areas of comparative delay for the student.

The facts in this case are that the child received a Terra test administered by Karen Vangalder, the School Psychologist. It is clear from the testing conducted that he is behind in the area of verbal intelligence receiving a score of 112. (Exhibit 2, page 65-69). The evaluation conducted also shows that he is average in reading for his age group. All of the other areas tested show high scores. The test score or evaluation alone does not prove that this child needs special education services. It does raise the question as to whether a problem exists in these areas.

The mother testified that she had recognized problems much earlier with her child and had informed the school system by letter on May 10, 2006 that her child had difficulty with verbal skills. (Exhibit 2, page 15). The mother also stated that he appeared to have difficulty with alphabet recognition. (Transcript 1, page 19, lines 4-6). Looking further to confirm these problems the regular classroom teacher or the Encore teacher, Nelda Sturgeon, testified she was concerned because of difficulties with verbal skills. (Transcript 1, page 208). Ms. Sturgeon also testified that the child would benefit from some additional services in reading, pre-reading or learning his alphabet. (Transcript 1, page 510).

These problems are also confirmed by Jody Harrison, another preschool teacher of the child who states that it is hard to understand his speech or verbal responses. "Like I mentioned earlier a lot of other adults and children have a hard time understanding him." (Transcript 1, page 99, lines 14-16).

Reviewing the expert testimony in this present case the Plaintiff relies upon their expert Beth O'Shea. Ms. O'Shea testified that there was a strong possibility that the child would be placed in a remedial reading class since the gifted class (Encore) is a general education classroom. (Transcript 2, page 522, lines 11-23). Ms. O'Shea further testified that the goal should be to

reduce the reading deficit or increase facility with reading. (Transcript 2, page 523, lines 23-24).

Ms. O'Shea further testified, "another strategy would be to have a specialist work with him to fill learning gaps based upon this Terra so that he can become more proficient with sub-skills that relate to the overall reading." (Transcript 2, page 529 lines 12-14). Within the time period which Ms O'Shea observed the child at school she did notice that he had difficulties getting words out and she states that he needs a language rich environment or a talking environment not just placing words on a board. (Transcript 2, page 525, lines 4-11). This Court finds this testimony to be credible and consistent with the other factual history submitted.

It is clear to this Court that this child is in need of special education services in order to receive a free appropriate public education at this time. As the Court stated in Deal, a child must receive a "meaningful educational benefit in relation to the potential of the child at issue."

The Deal Court makes it clear that each case is fact specific and therefore must be viewed individually based upon the facts and circumstances. Meaningful educational benefit for a gifted child is quite different from that of other disabled children. The child in the present case is intellectually gifted and has high scores in every area except verbal and reading. Upon averaging these scores he still maintains an IQ of 130. The potential for this child is great and therefore this Court looks to the problem or delay areas which he has at this times as stated in Benjamin. It is clear from the testimony as set forth above that this child needs a reading specialist or other specialist to assist him with verbal, reading and alphabet recognition problems at this time. He needs an individualized educational program that outlines goals and objectives that will provide him with a free appropriate public education.

As to the second issue in this case the Plaintiff raises numerous procedural violations committed by the school system. The Plaintiff asserts that the school system has a one size fits all system in which all students are treated the same. The Court does recognize that the change of the Encore class from having all special education students to an all regular education classroom is highly unusual. This Court must consider only whether or not this particular child needs special education and any related services. The Defendant concedes that the school system committed a procedural violation by failing to invite Nelda Sturgeon, the regular classroom teacher to the IEP team meeting.

Tennessee Rules, Regulations and Minimum Standards 0520-1-9-.09 (Composition of the IEP Team) states. (1) An IEP team for each child eligible for special education includes:

- (a) One (1) or both of the child's parents;
- (b) At least one (1) general education teacher of the child (if the child is, or may be, participating in the general education environment);
- (c) At least one (1) of the child's special education teachers or certified/licensed service provider, or if the child has not been previously enrolled in school, a teacher or other specialist qualified to teach a child of his or her age in the areas of a child who is suspected of having special education needs;
- (d) At least (1) representative of the local school system, other than the child's teacher, who: 1. Is an administrator or designee; 2. Is qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities; 3. Is knowledgeable about the general curriculum; and 4. Is knowledgeable about the availability of necessary resources to ensure implementation of the IEP.

The school system argues that this procedural violation is harmless in nature because it is only a technical violation and not precluding the child of any substantive rights. This Court does

not agree. Nelda Sturgeon is the regular education classroom teacher. Other than the mother of the child, Ms. Sturgeon worked with the child more than any other person in the school system.

Ms. Sturgeon testified of the problems and concerns of this child. In the event she had been present at the team meeting it is likely she would have been able to contribute significantly. The psychological assessment report conducted by Karen Vangalder, who implemented the Terra, was not completed until November 2, 2006. If the regular education teacher had been present at the meeting these problems could have been discussed and it is likely that these tests which showed delay areas would have been completed sooner. The combination of information at these meetings is imperative to determine the individualized needs of a child. This was only one of the factors ultimately causing the August 15, 2006 IEP meeting to get continued by the school system. The meeting to determine the child's eligibility for special education services was postponed until October 23, 2006. (Transcript 1, page 57).

Tennessee Rules Regulations and Minimum Standards 0520-1-.09 states, (a) Following the local school system's receipt of a written parental consent for evaluation, and consistent with the local school system's process to provide children eligible for special education with services and a special education placement within forty (40) school days from the receipt of written parental consent for evaluation system shall: 1. Evaluate the child; 2. Invite IEP team members to a meeting; 3. Determine whether the child meets Tennessee criteria for a child with a disability and requires special education and related services; 4. Develop and IEP for the child at this meeting or no later than thirty (30) days after determination of eligibility; and 5. Determine educational placement based on the child's unique needs as specified in the IEP.

It is clear the school system did not conduct this meeting as required within the forty (40) day time period. In addition, all of the materials compiled for these meetings, including teachers checklists were inadequate for a child who is intellectually gifted with these particular problems (Exhibit 2, page 45). Therefore, the school system did not prepare for the meeting in a fashion which would allow the correct information to be presented to develop an IEP.

CONCLUSION

The Plaintiff is the prevailing party in this case and the Defendant is ordered to obtain a reading specialist or other specialist in the form of special education services to assist the child with verbal, reading or alphabet recognition problems. The school system is further ordered to develop an individualized educational program that outlines goals and objectives that are individualized for the particular child which will provide a free appropriate education.

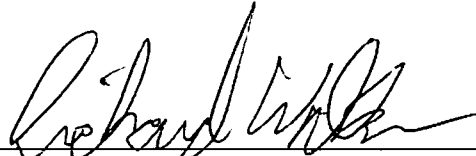
Respectfully submitted,



RICHARD H. WALKER
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this foregoing document has been sent by postage prepaid mail this 21st day of March, 2007, to the School System and the Child, through counsel, if any, directly if not.



RICHARD H. WALKER